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No. 08-

IN THE
Supreme Court of the United States

TIMOTHY RAFFERTY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the principles set forth in *Dura Pharmaceuticals Inc. v. Broudo, 544 U.S. 336* (2005) regarding loss calculations in civil cases should apply in criminal cases.

2. Under 18 U.S.C. § 3771, victims are entitled to notice of court proceedings, to be heard at sentencing, and to be treated with fairness. The question presented are: (A) whether government prosecutors, under the guise of giving victims notice, may inform potential witnesses of their theory of the case and belief in the defendant's guilt; and (B) whether a victim's desire to appear on the defendant's behalf at sentencing must be honored.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Timothy Rafferty respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit (Pet. App. 1a) is unpublished and appears at 296 Fed.Appx. 788 (11th Cir. 2008). The Court of Appeals' order denying petitioner's petition for rehearing (Pet. App. 22a) is unpublished.

JURISDICTION

The judgment of the Court of Appeals was entered on October 16, 2008 (Pet. App. 1a). The Court of Appeals' order denying petitioner's application for rehearing was denied on December 16, 2008. On March 23, 2009, Justice Thomas granted petitioner's application for an extension of time for filing a petition for a writ of certiorari to May 14, 2009. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fifth Amendment to the United States Constitution provides in relevant part: "No person shall be . . . deprived of life, liberty or property without due process of law . . . ."

The Sixth Amendment to the United States Constitution provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury."

The relevant sections of the Crime Victims Act, the United States Sentencing Guidelines, and 15 U.S.C. § 78j are reproduced at Pet. App. 23a-25a.

STATEMENT OF THE CASE

This securities case is unusual in one respect: a majority of the "victim" shareholders, in an unprecedented show of support for petitioner, insisted that they had not been defrauded by him and did not want their losses factored into his sentence. In other aspects, however, the case is representative of the difficult issues that are frequently litigated in securities cases and about which the courts of appeal are hopelessly divided.

Factual Background

Uncommon Media Group (UMDA) was a startup company involved in "crossover media" with, in the government's words, an "interesting concept"

and some "interesting ideas" about tracking downloads of music on the internet (T8).[1]

The company "had a business plan, it had some technology, it had opportunities to merge with other companies. What it didn't have was capital. And that's where Timothy Rafferty came in" (Government's opening at T9). In March, 2003, petitioner was approached by UMDA's investment broker and by the company's largest investor and asked to help raise funds to acquire the necessary technology to implement UMDA's business plan.

Petitioner was excited by the UMDA technology and agreed to help raise funding for the company.[2] He invested his own money to help UMDA acquire a company with proprietary tracking software.[3] A deal was consummated with the software company in July 2003 (T122). A few months later, UMDA entered into a contract with the Nielsen

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[1] References preceded by "T" are to the trial transcript.

[2] Nearly all of the witnesses at trial testified that, throughout the period of the indictment, petitioner was "someone that was interested in this company being built and succeeding" (1178), was "enthused about this project [and] he felt that this was going to be a winner for all the people that had invested in it)" (T476), he was "enthusiastic" and wanted the company to succeed (T74, 872,).

[3] On May 22, 2003, he wired $70,000 from his trading account to an account that was established to close the deal with the software company (T2018). He then borrowed $210,000 so UMDA could purchase additional shares of the company (T1160). Petitioner invested a total of $492,000 in UMDA in 2003 (T1186, 1482). UMDA issued a secured convertible promissory note to him for $461,000, reflecting monies he had lent the company (T1386, Govt. Ex. 748). He also lent a fellow investor $23,000, and secured the loan with the investor's UMDA stock (T1979).

Company, a leading marketing and media information company (T122).

Petitioner mentioned UMDA as an investment opportunity to an acquaintance, Fred Hornick from Colorado, who in turn told his friends and family, many of whom became UMDA investors (T219, 224-225). Petitioner told them he was not an officer of UMDA, or an "insider," but merely an investor (T225, 494, 531, 710). Hornick spoke personally with the patent holder of the technology UMDA was using and watched it in action on his computer (T01).

Hornick brought in over 100 investors, raising about $1.4 million for UMDA, most of which was wired directly to UMDA's bank account, some of which was wired to companies in California and some to third parties, usually at petitioner's direction (230, 1480). Over the course of several months, petitioner and Gallo gave the investors an extremely rosy outlook for UMDA, and petitioner exaggerated his family's wealth. However, as one investor testified, petitioner warned them about the risks of investing in UMDA: "he pointed out that this is all very risky, right? We're launching a new company. There were risks. It was wrought with risks, I believe is what he said" (T2057). Gallo and petitioner did not tell potential investors that the available shares were not free-trading, although at least by December 2003, it was publicly known that the stock would have to be restricted (T472). Petitioner did not tell all the investors that 12 years earlier, he had been convicted of a securities fraud, nor that 11 years earlier, the SEC had enjoined him from committing securities fraud, nor that he had several un-

related civil judgments (T687, 1285-1286).[4] Mark Gottlieb, a lawyer who had worked for petitioner and was brought in to "clean up" UMDA's problems testified that he did not believe petitioner had any "fiduciary duty to disclose" his conviction (T1114).

Many of Hornick's investors also purchased a substantial number of shares in two privately held companies, Third Dimension and Data Treasury. Petitioner had large positions in options on those companies. As directed, Hornick wired Third Dimension and Data Treasury monies to various third party accounts, including petitioner's accounts.

Petitioner did not have any control over the books and records of UMDA and was not an officer or a salaried employee (T109-110). The company's CEO was Lawrence Gallo, who, petitioner came to learn, had been indicted in 2002 for conspiring to defraud UMDA shareholders. He was released on bail, and continued to operate the company. He belittled the indictment, telling petitioner and other investors that it was a mistake.

By the fall of 2003, CEO Gallo was making tens of thousands of dollars in cash withdrawals from the UMDA account to support his cocaine habit, pay his criminal defense lawyers, and make a down payment on a house (T984, 1907). Petitioner was also making withdrawals of money that had been wired to third party accounts for UMDA, but, according to Mike Contento (the man who was hired by UMDA in September/October 2003 to bring the UMDA books and records up to SEC compliance) it

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[4] At least one of the investors who testified for the government at trial stated that petitioner told him about getting "enveloped in a securities violation" (T483).

was "understood that [petitioner] had put ... money into the company" and the withdrawals were for monies that "were owed to him" (T1920). Contento testified that, while the money "should have come into the company first, and then [petitioner] should have gotten his money," that was "just the way the whole accounting at UMDA] went" (T1920). Contento was unhappy about the "bizarre" way that UMDA handled its accounting ("Money was just given to people without a ledger, you know, and it was shocking")(T1886), but he never had any reason to believe that petitioner was diverting funds from UMDA (T1922).[5]

After Contento found that Gallo had been diverting funds from UMDA for personal use, he told petitioner and others who were trying to "clean up the mess" that Gallo had made of the company (T1898, 1907-1908). They brought in Gottlieb, who convinced Gallo to resign in February 2004.

Nonetheless, in March 2004, the SEC placed a restraining order on UMDA, effectively terminating its operations (T485, 636, 1117, 1185, 1911, 1989). The SEC injunction was related to Gallo's 2002 indictment, covering events which occurred before petitioner became involved with UMDA (Government's brief in the Court of Appeals at p.6 n.6). One of the UMDA investors testified that in September 2005, he received a telephone call from an FBI agent. He asked the agent whether the restraining order would be removed. "At that time, he told me, which was a great surprise, that the Justice Department had

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[5] With respect to Contento, the government told the jury: "Mike Contento testified in the grand jury, and it was obvious that he is clueless" (T2181).

made arrangements with the Securities and Exchange Commission to hold on to our corporation and keep it under lock and key for quite an extended period of time" (T1988).

In July 2004, petitioner and Gallo were indicted and charged with securities fraud. The indictment included the allegation that petitioner failed to disclose to investors that he had been convicted of securities fraud 13 years earlier.[6] Shortly thereafter, Gallo pled guilty to both the 2002 and 2004 charges. After cooperating with the government, he served a 47-month term of imprisonment.

After petitioner was indicted, government prosecutors and FBI agents contacted many of the UMDA investors, and told them that UMDA was merely a "sham company," a "Ponzi scheme," a "shell game" (T509, 538, 2060)

In January 2006, the government prosecutors wrote a letter to the UMDA investors, purportedly pursuant to the requirements of the CVRA. In it, the government stated:

> The government alleges that Rafferty solicited more than one hundred small investors to invest funds in ... UMDA ... by making materially false statements to those investors. Rafferty failed to disclose that he had been convicted of securities fraud in 1991 and that over the course of the next 10

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[6] A superseding indictment added two substantive wire fraud counts and incorporated allegations that he failed to disclose to investors a 2003 Georgia default judgment and a New York case that was resolved by a negotiated settlement.

> years, had continued to defraud investors in a number of different cases. Even as UMDA was ceasing to be a going concern, and as its prospects continued to flag, Rafferty and Gallo continued to represent to investors that the company was a gold mine. ... The evidence in the case will show that the money was diverted from UMDA by these men, and in Rafferty's case, used to pay for the myriad of civil fraud judgments he has pending against him, as well as payment of expenses such as his mortgage, a BMW, and other personal expenses (Appendix to Petitioner's brief in the Court of Appeals, DE-154).[7]

In pretrial proceedings, the defense moved to dismiss the indictment, arguing that this letter amounted to witness tampering, depriving him of his right to a fair trial. The prosecution responded that it was required by federal law "to send out this letter. So by law it is impossible that the government was vindictive." The trial court denied the defense motion, concluding that the letter was sent pursuant to 18 U.S.C. §3771, and 18 U.S.C. §3771(d)(1) pro-

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[7] Attached to one of the letters was a New York Daily News article entitled "Brokers Busted in 2.5M Pad Scam." The prosecutor explained: "'I don't think attaching a newspaper article that I happened to have on my desk because it was just there. I was trying to give him info, you know, call me this is something that's ongoing, the trial is starting. ... I wasn't trying to taint him in the process, just communicate with him" (2/23/06 Pretrial hearing at p.8).

vided that an accused could not obtain relief under that statute (Pretrial hearing, February 23, 2006 at pp2-3).

After a three-week trial, petitioner was convicted as charged.

Sentencing

At a first sentencing proceeding, the court articulated the standard it would use for calculating loss:

> The determination is how much did people invest based upon fraudulent representations that were made to induce them to purchase the stock. Whether or not [the defendants] put it in their own pocket or they actually used the money to try and run the business appropriately, either one of those is irrelevant. The question is how much money was fraudulently received based upon the misrepresentations or omissions (July 14, 2006 Sentencing Proceeding at pp.43-44).

The defense contended that the court would first have to determine whether any alleged loss was "as a result of the misrepresentation charged" (7/14/06 Sentencing at p.53). It noted that despite the government's outreach to the investors, only ten had responded. The prosecution argued that it was irrelevant that many of the investors did not consider themselves to be victims: "There is no case law supporting that you have to believe you are a victim in order to be a victim for guideline purposes"

(7/14/06 Sentencing at p.80). It also stressed that the investors were an "unsophisticated" group of Mormons (7/14/06 Sentencing at p.82).

The court adjourned the proceedings to review the bank records and other evidentiary materials (7/14/06 Sentencing at p.98).

At a second proceeding in September, defense counsel spoke on behalf of 120 of the 200 investors the government had identified. They wanted the court to consider their letters, stating in effect that they did "not want their losses in terms of monetary value or in terms of their numbers as people to be used to enhance" petitioner's sentence. They had even written to their senators and congressman saying: "Help us explain to Judge Marra that we do not want our losses in UMDA to be used against Tim Rafferty at his sentencing" (9/12/06 Sentencing at p.62). When the court complained that the letters were not submitted earlier, defense counsel noted that they had been submitted to the government at around the time of the first sentencing proceeding.

The court responded: "What is it you want to tell me; that they think Mr. Rafferty's a great guy? I heard their testimony that he didn't do anything wrong, that they had faith in him, that they believed he was acting in their best interest. What else do I need to know? I mean, I've heard it already. ... I'm just going to make it part of the record for appellate purposes for whatever it's worth. ... So there's no argument that I kept things out of the record" (September 12, 2006, Sentencing at pp.59-63).

The defense attempted to introduce an accountant's affidavit, which included UMDA's closing prices and daily trading volume for the time period of the charged conspiracy and the subsequent four

months. The data was derived from Bloomberg's market data service, and indicated that at the beginning of the charged conspiracy, UMDA was trading at appropriate three cents per share. At the end of the conspiracy period, it was trading at six to eight cents per share.

Defense counsel argued that the investors suffered no loss until the company's activities were terminated by the temporary restraining order: "these losses that the investors incurred in this case were as a result of the government closing down the business" (9/12/06 Sentencing proceeding at p.37).

The court, ruling that the accountant's affidavit was inadmissible hearsay, summarily dismissed the defense argument and proffer. It concluded that the stock became worthless as a result of the fraud, and calculated the loss as the total amount invested by the investors for the duration of the conspiracy.

Recognizing that petitioner "didn't personally profit" from the charged conspiracy (9/12/06 Sentencing at p.84), the court added 16 levels to his guideline offense level on the basis of a $1.1 million loss calculation. Petitioner was sentenced to a term of imprisonment of 126 months.

Appeal

On appeal, petitioner challenged, *inter alia*, the district court's methodology for determining loss for sentencing purposes. The Eleventh Circuit was apparently unwilling to adopt the reasoning of *Dura Pharmaceuticals, Inc.* v. *Broudo*, 544 U.S. 336, 125 S.Ct. 1627 (U.S. 2005) in the criminal context; it upheld the district court's decision to count as a loss the entire amount of UMDA investments, without

identifying a causal connection between the purported loss and the alleged misrepresentations. The Circuit accepted the district's conclusion that the stock became worthless by the end of the conspiracy period, despite contrary evidence provided by Bloomberg Market Data Service records.[8] It also apparently approved the district court's decision to include in its loss calculation the monies lost by those 'victims' who had asked that their losses not be used to enhance petitioner's sentence.

The Eleventh Circuit did not reach petitioner's contention that the prosecution's letter to prospective witnesses/victims was improper.

REASONS FOR GRANTING THE WRIT

Loss Calculation

The calculation of loss under the fraud Guideline, Section 2B1.1(d), drives the length of the sentence and bedevils courts in criminal securities fraud cases. Here, for example, petitioner's offense level was increased by *16 levels* based on the district court's loss calculation, which it arrived at after rejecting the calculations proposed by the government, the defense and the probation office. The federal courts are deeply divided as to what exactly the government has to show in order to prove loss causation; as a result, the length of a securities' fraud sen-

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[8] The Circuit could not have arrived at this conclusion without endorsing the district court's rejection of the Bloomberg quotes on hearsay grounds, despite Circuit precedent specifically holding that Bloomberg market quotes are admissible pursuant to FRE 803(17). United States v. Masferrer, 514 F.3d 1158 (11th Cir. 2008).

tence depends largely on the court in which the case was tried. Loss calculation is an important issue, since the need to calculate loss arises in virtually every securities fraud prosecution, and there is an intrinsic difficulty in proving loss in such cases even under the clearest of measures: "The loss to investors who hold during the period of an ongoing fraud is not easily quantifiable because we cannot accurately assess what their conduct would have been had they known the truth." United States v. Ebbers, 458 F.3d 110, 127 (2d Cir. 2006). And, given the size of the enhancement, it is fair to say that accurately determining loss is the most important task facing a court in a securities fraud conviction. The lower courts need this Court's guidance to resolve this confusion and to ameliorate the risk of substantially overstating actual loss.

In *Dura Pharmaceuticals Inc. v. Broudo,* 544 U.S. 336, 125 S.Ct. 1627 (2005), this Court resolved a marked conflict amongst the courts as to what exactly plaintiffs had to show in order to prove loss causation in a private securities fraud action. Loss causation, as defined in *Dura*, is the "causal connection between the material misrepresentation and the loss." 125 S.Ct. at 1631. In other words, in civil fraud cases, a claimant must show that the decline in the market price was due to the fraud, as opposed to other factors

In the wake of *Dura*, however, the courts have been conflicted as to whether or not such a showing is required in criminal cases involving securities fraud.[9]

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[9] In fraud cases, a defendant's Guidelines offense level generally begins with a base offense level of six or seven. Under Sec-

The Second, Fifth and Ninth Circuits have all applied the precepts of *Dura* in the criminal context. The Second Circuit concluded that "considerations relevant to loss causation in a civil fraud case should ... apply, at least as strongly, to a sentencing regime in which the amount of loss caused by a fraud is a critical determinant of the length of a defendant's sentence." United States v. Rutkoske, 506 F.3d 170 (2d Cir. 2007). *See also* United States v. Zolp, 479 F.3d 715 (9th Cir. 2007); United States v. Olis, 429 F.3d 540 (5th Cir. 2005)("because a company's stock is affected before and after the fraud, by numerous extrinsic market influences as well as the soundness of other business decisions by the company, the calculation of loss attributable to securities fraud requires careful analysis").

The Eighth Circuit has taken the opposite approach and rejected the application of *Dura* in the criminal context, adding: "Criminal prosecutions for violations of securities law are different [from civil cases], however, for 'the victims and their losses are difficult if not impossible to identify' as the guideline commentary points out." United States v. Mooney, 425 F.3d 1093 (8th Cir. 2005). With its decision below, the Eleventh Circuit has followed the Eighth Circuit's approach. Unlike the Second, Fifth and Ninth Circuits, which require that losses from causes other than the fraud be excluded from the

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tion 2B1.1(d), levels are added depending on the amount of monetary loss the victim(s) suffered as a result of the defendant's offense conduct. The fraud Guideline's commentary states that "loss is the greater of actual loss or intended loss." Both actual and intended loss are calculated to measure the seriousness of the offense, as well as the defendant's level of culpability in committing the offense.

loss calculation, the Eighth and Eleventh Circuits permit the district court to ignore the variety of other factors (including changed economic circumstances, changed investor expectations, industry-specific or firm-specific facts, conditions or other events, taken separately or together) that may account for some or all of a stock's lower price.

This split is causing unwarranted sentencing disparities across the country, since the length of sentences meted out in securities fraud cases over recent years is driven by the measure of the financial losses. [10]

Similarly, the Circuits run the gamut in how broadly they construe the realm where they will require detailed proof of loss causation. The Eleventh Circuit has apparently concluded that detailed proof is not necessary so long as a stock was "worthless" at the *conclusion* of the conspiracy. Pet. App. at 16-17a. By contrast, in *United States* v. *Olis*, 429 F.3d at 546, the Fifth Circuit held that detailed proof is not necessary if the stock was worthless *before, during* and at the *conclusion* of the scheme. In *Olis,* the

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[10] As an example, in a fraud prosecution in the Southern District of New York, the government originally sought a sentence based on the total market capitalization loss of $6 billion upon disclosure of the fraud. But a defense expert's analysis attributed the vast bulk of the share price decline to issues other than the fraud in which the defendant was involved. The resulting seven-year sentence, while significant, was far lower than the life sentence dictated by the advisory guidelines under the government's original loss analysis. *United States v. Mark Kaiser*, 04 Cr. 733 (S.D.N.Y. 2006). In many cases where the initial loss estimates are much smaller (for instance, in many options backdating schemes), the application of *Dura's* loss causation principles may even mean the difference between jail and probation.

court noted that where a defendant "promoted worthless stock in worthless companies, measuring the loss as the entire amount raised by the scheme is neither surprising nor complex, and is fully consistent with civil loss causation." *Id.* That is because where there is no value to the stock before or after the scheme, all money lost through investment in the stock is the result of the fraud. The Ninth Circuit has defined a "worthless stock" very narrowly: a company is not a "sham operation" within the meaning of the *Olis* exception, if it (a) is in fact incorporated and (b) occupies real estate. Where those meager requirements are met, the Ninth Circuit will require the Government to prove loss causation in detail. United States v. Zolp, 479 F.3d at 720. Similarly, in *United States* v. *Rutkoske*, *supra*, the Second Circuit required a detailed loss causation analysis despite the defendant's brokerage firm handling the vast majority of the volume of the subject stock during the manipulation period (between 72 and 90%), which, when coupled with the evidence of broker bribery and other high pressure sales tactics, could easily support a finding that the public market for the stock was wholly engulfed in a manipulation scheme and therefore that all loss was attributable to the fraud. And in *United States* v. *Ebbers* and *Rutkoske*, *supra*, the Second Circuit repeatedly emphasized the narrowness of those situations where no loss analysis is required: "cases might arise where share price drops so quickly and so extensively immediately upon disclosure of a fraud that the difference between pre- and post-disclosure share prices is a reasonable estimate of loss caused by the fraud. Even there, however, a coincidentally precipitous de-

cline in shares of comparable companies would merit consideration." *Id.*

This case is an excellent vehicle for considering the questions presented, since there can be no doubt that, had this case been tried in the Ninth, Second, or Fifth Circuits, the result would have been dramatically different. Clearly, this was not the case of a "sham" company as defined by the Fifth and Ninth Circuits. Nor would this case have fallen into the small category of cases where the Second Circuit would forgo detailed analysis. Moreover, the result in this case would undoubtedly have been different under the methodology employed by those Circuits, since there was undisputed evidence of other factors contributing to any loss.[11] Most significant was the SEC's TRO which, as the government conceded below, was imposed for reasons predating petitioner's involvement with the stock. Since nearly all of the witnesses at trial testified that the TRO was the main cause of UMDA's demise, under *Dura*, losses attributable to the TRO would have to be excluded from the loss calculation.[12] Additionally, a number

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[11] The district court in this case did not perform a loss calculation as described in the above-cited cases, since it did not determine precisely which losses could be attributed to the charged fraud as opposed to other factors. Instead, it merely searched the record to determine the total amount invested in UMDA through petitioner.

[12] The Ninth Circuit dealt with a similar issue in a different context. In United States v. Tyler, 767 F.2d 1350 (9th Cir. 1985), the defendant was arrested for cutting down timber from a national forest. The government took possession of the timber that same day, but retained it for evidentiary purposes. By the time the government sold it, the value of the timber had dropped significantly. The district court ordered the defendant to pay restitution for the decreased value of the timber. The

of investors testified that their decision to invest in UMDA was independent of any of the petitioner's statements or omissions. Under *Dura*, their investments would likewise have to be excluded from the measurement of loss.

The standard for determining loss takes on particular important during difficult economic times such as these, where the vast majority of public companies have experienced falling stock prices due to macroeconomic conditions. Securities cases are all but certain to proliferate. *See generally,* Ashby Jones, *Making Sense of the Mini-Boom in Securities Suits*, WALL ST. J., May 6, 2009; Steven M. Davidoff, *A Brave New World for the S.E.C.*, N.Y. TIMES, May 8, 2009; Sarah Lynch, *SEC, CFTC Would Get More Enforcement Resources*, WALL ST. J., May 7, 2009. At the same time, untangling the effect of a defendant's conduct from other extraneous factors on a stock price becomes increasingly difficult when significant declines in company stock prices are commonplace. In such circumstances, guidance from this Court is critical.

Ninth Circuit reversed the restitution order and found that the defendant did not cause the loss. The court observed: "Any reduction in [the timber's] value stems from the government's decision to hold the timber during a period of declining prices, not from [the defendant's] criminal acts." *Id.* at 1352. *See also* United States *v.* Peterson, 538 F.3d 1064 (9th Cir. 2008)("defendant's conduct need not be the sole cause of the loss, but any subsequent action that contributes to the loss, such as an intervening cause, must be directly related to the defendant's conduct. The causal chain may not extend so far, in terms of the facts or the time span, as to become unreasonable").

The CVRA

In 2004, Congress passed the Crime Victims' Rights Act (CVRA), giving victims some rights to participate in the federal criminal justice system.[13] Instead of making victims parties or intervenors in criminal prosecutions, the CVRA asks courts and prosecutors to vindicate victims' interests. This unusual posture creates substantial conflicts for courts and prosecutors.

"CVRA is a relatively new statute that effects dramatic changes to our traditional criminal justice system. The participants in that system--prosecutors, defendants, victims, and courts alike--are rightfully struggling with its scope and meaning." *In re* Antrobus, __ F.3d __ , 2009 U.S. App. LEXIS 8264* at *23 (10th Cir. April 22, 2009).

Moreover, the legislation itself provides little guidance to courts and prosecutors on how to incorporate the statute into federal prosecutions. Nor does the sparse legislative history provide any guidance.[14] On one hand, its drafters took pains to stress

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[13] In addition to the CVRA, every state has passed victims' rights legislation, and a majority of states have amended their constitutions to recognize victims' rights as well. *Recent Development, The Victims' Rights Amendment*, 42 H.J.L. 525, 526–27 (2005).

[14] Congress enacted the CVRA when sponsors of a crime victims' constitutional amendment failed to secure sufficient support for its passage after years of debate and lobbying efforts by victim advocates. 150 CONG. REC. at S4261 (Apr. 22, 2004) (statement of Sen. Feinstein). Because Congress rushed to pass the statute, the legislative history supporting the CVRA consists of only two floor statements by the statute's sponsors, Senators Dianne Feinstein and Jon Kyl. Kenna v. U.S. Dist. Court, 435

that the rights in the CVRA "do not come at the expense of defendant's [sic] rights."[15] But they also demanded that courts and prosecutors avoid "whittl[ing] down or marginaliz[ing]" victims' rights and "treat victims of crime with the respect they deserve and . . . afford them due process."[16]

This case presents two important issues relating to investor/victims in securities fraud cases: the line between appropriate notice to victims and impermissible witness coaching; and the inclusion of victims at sentencing.

The first issue involves the interaction between the government and prospective witnesses/victims in this case, and the propriety of a letter sent to prospective witnesses/victims which included the prosecution's view of petitioner's guilt. Given that securities fraud cases characteristically involve large victim bases, the government often has to resort to mass mailings or publication to fulfill its obligation under 18 U.S.C. § 3771(a)(2) to give victims notice.[17]

F.3d 1011, 1015–16 (9th Cir. 2006); United States v. Turner, 367 F. Supp. 2d 319, 323 n.3 (E.D.N.Y. 2005) (mem.).

[15] 150 CONG. REC. S4262 (daily ed. Apr. 22, 2004) (statement of Sen. Feinstein).

[16] 150 CONG. REC. S10,911 (daily ed. Oct. 9, 2004) (statement of Sen. Kyl).

[17] For example, in *United States* v. *Saferstein*, slip op., 2008 WL 4925016 *3 (E.D. Pa. Nov. 18, 2008), where the government had to notify 300,000 people, the court approved publication in the newspaper and an interactive website. Unlike this case, however, the notice was carefully drawn to avoid contamination. It stated the name of the company and defendants' titles but not their names, omitting tax and perjury charges because there were no victims, and stating that an "indictment is an accusation," and a "defendant is innocent unless and until proven guilty."

The question of what information those mass mailings may include is one of significance and one which will inevitable recur with some frequency.

Here, the court allowed the prosecutor to include a highly opinionated version of the case in its letter to possible victims/witnesses.[18] When petitioner moved to dismiss the indictment, arguing that the letter constituted "an intentional act to influence prospective witnesses" (Pretrial hearing, February 14, 2006 at p.45), the district court denied the motion on the ground that the letter was authorized under 18 U.S.C. §3771 and that under that statute the defendant is precluded from obtaining relief.[19] With this ruling—a ruling which the Eleventh Circuit, given its affirmance, apparently endorsed—the court interpreted the CVRA as stripping the petitioner of his due process right to a fair trial. For, while a defendant could otherwise argue that his right to due process had been violated by egregious

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[18] One witness testified at a pretrial hearing that the letter was circulated among the investors and was "very upsetting because it presented a completely different representation of what I know the man to be" (Pretrial hearing, February 14, 2006 at p.21). He said that another investor, upon reading the letter, was also very upset, and told him: "I am really angry. ... I just want my money back" (2/14/06 hearing at p.25).

Interestingly, the Justice Department has decried precisely the same conduct when it emanated from the defense camp. It accused Arthur Andersen, Enron Corp.'s former auditor, of "behavior bordering on 'witness coaching' in its media campaign challenging the government's obstruction of justice charge." *Justice Department Accuses Andersen of 'Witness Coaching,'* KNIGHT RIDDER/TRIBUNE BUSINESS NEWS, Mar. 29, 2002.

[19] Under 18 U.S.C. § 3771(d)(1), a "person accused of the crime may not obtain any form of relief under this chapter."

witness coaching,[20] under the CVRA, the court concluded, that avenue was no longer available.

It is important for this Court to address this issue, not only to provide guidance for the proper interpretation of the CVRA, but also because this case affords a rare opportunity to address witness coaching, "the 'dark'—some have even called it 'dirty' —secret of the U.S. adversary system." Bennett L. Gershman, *Witness Coaching by Prosecutors*, 23 CARDOZO L.J. 829 (2002). While there is a body of scholarly commentary devoted to witness preparation generally, "there has been very little discussion by courts and commentators on witness ... coaching by prosecutors." *Id.* at 831.

The second aspect of the CVRA raised by this case involves the responsibility of the sentencing court to ensure that victims are "reasonably heard" before imposing sentence. 18 U.S.C. § 3771(a)(4).

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[20] As Judge Francis Finch of the New York Court of Appeals put it, the attorney's "duty is to extract the facts from the witness, not to pour them into him; to learn what the witness does know, not teach him what he ought to know." *In the Matter of Eldrige*, 37 N.Y. 161, 171 (1880). *See* Geders v. United States, 425 U.S. 80, 90 n.3 (1976) ("An attorney must respect the important ethical distinction between discussing testimony and seeking improperly to influence it."). *See also* United States v. Guthrie, 557 F.3d 243 (6th Cir. 2009)(prosecutor may "have conversations with his witness. He may not coach the witness"). The danger that a prosecutor may improperly influence a witness' testimony is even greater than it is with other attorneys. Because of the prosecutor's unique status as the attorney for the government, he ordinarily is viewed by the witness as a highly knowledgeable official who can be trusted to use the facts responsibly.

The CVRA does not explain how much weight, if any, courts should give victims' opinions. And the lower courts disagree as to the scope of this provision. *Compare, e.g.,* United States v. Marcello, 370 F.Supp.2d 745, 48 (N.D. Ill. 2005)(mem.) ("[T]he statute requires only that a victim be reasonably heard, and . . . Congress's use of that term of art does not require that a trial court accept oral statements in all situations."), with Kenna v. U.S. Dist. Court, 435 F.3d 1011, 1016 (9th Cir. 2006) ("The statements of the sponsors of the CVRA and the committee report for the proposed constitutional amendment disclose a clear congressional intent to give crime victims the right to speak at proceedings covered by the CVRA.").

Here, the district court arrived at a sentencing determination without considering letters written on behalf of a majority of the UMDA investors.[21] These investors were not insisting on appearing in person, but merely wanted the opportunity to be "reasonably heard" as required by the statute.

The propriety of excluding victims who wish to weigh in at sentencing on the defendant's behalf is an issue of national importance, given the substantial impact such testimony can have on a defendant's sentence. While not the norm, it is far from unusual

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[21] "Reasonably heard" is a legal term of art meaning to bring one's position to the attention of the court, in person or in writing, as the court deems reasonable under the circumstances. *See* O'Connor *v.* Pierson, 426 F.3d 187, 198 (2d Cir. 2005); although the district judge made the victims' letters part of the record to preserve them for appellate purposes, he did not read them himself. Thus, the investors did not have a meaningful opportunity to have their position brought to the court's attention before it determined the appropriate sentence.

for a victim's statement to prompt a lighter sentence. *See, e.g.*, Monica Mercer, *Hamilton County: Forgiveness leads to lighter sentence,* CHATTANOOGA FREE PRESS, June 3, 2008 (although sentencing court had intended to impose an 8-12 year sentence, defendant received a suspended sentence after hearing victim's statement); *Man sentenced to community service for distracted driving death,* http://www.abc4.com, Nov. 10, 2008 (judge placed defendant on probation and ordered him to do 500 hours of community service for vehicular homicide after hearing plea from victim's mother); Mari A. Schaefer, *Victim's forgiveness keeps embezzler out of prison,* PHILADELPHIA INQUIRER, May 6, 2009)(defendant given probation where sentencing court gives "full weight" to the victim's request for leniency).[22] In short, this issue is of importance, not only to petitioner but to criminal defendants generally. Accordingly, it is worthy of consideration by this Court.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

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[22] While a defendant cannot seek re-sentencing on the basis of a violation of the CVRA, he may appeal the failure of the sentencing court to hear the victims' perspective under 18 U.S.C. §3553(a)(1) and 3661.

Respectfully submitted,

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May 13, 2009

APPENDIX

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
OCT 16, 2008
THOMAS K. KAHN
CLERK

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 06-15090

D. C. Docket No. 04-20478-CR-KAM

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
versus
TIMOTHY RAFFERTY,
a.k.a. Tim Rafferty,
Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Florida

(October 16, 2008)

Before TJOFLAT and BLACK, Circuit Judges, and EVANS, District Judge.

*

EVANS, District Judge:

Honorable Orinda Evans, United States District Judge for the Northern District of Georgia, sitting by designation.

*

Timothy Rafferty ("Rafferty") appeals his convictions and sentence on counts of conspiracy to commit securities fraud, conspiracy to commit mail fraud and

wire fraud, and two substantive counts of wire fraud. Rafferty raises numerous issues on appeal challenging evidentiary rulings, legal rulings, his convictions, and the sentence imposed. After oral argument and a careful review of the briefs and record in this case, we affirm.

BACKGROUND

Rafferty was charged in a second superseding indictment with conspiracy to engage in securities fraud, in violation of 15 U.S.C. §§ 78j(b), 78ff(a) and 18 U.S.C. § 371 (Count 1), conspiracy to commit mail fraud and wire fraud, 18 U.S.C. § 1349 (Count 2), and wire fraud, 18 U.S.C. § 1343 (Counts 3 and 4). He was convicted on April 10, 2006 by a jury on all Counts. He was sentenced on September 12, 2006 to 126 months' imprisonment, followed by three years of supervised release. The sentence included a requirement of $1,234,880 in restitution and forfeiture of $1,198,450 in certain property. Post-trial motions for new trial on Counts 1 and 2 and for judgment of acquittal on Counts 3 and 4 were denied. Rafferty timely filed a notice of appeal.

Taking the facts in the light favorable to the verdict, the evidence at trial[1] showed that Rafferty began his association with Uncommon Media Group, Inc. ("UMDA") in 2003 when its CEO Lawrence Gallo ("Gallo") persuaded Rafferty to join his operations.

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[1] The testimony of over thirty witnesses along with hundreds of exhibits, including eleven summary charts (discussed infra), was presented at trial.

Rafferty worked at UMDA on a daily basis, shared an office with CEO Gallo and spoke with potential investors, but was neither a corporate officer nor a salaried employee of UMDA. Rafferty held himself out to be both a major investor in and consultant to UMDA.

Rafferty established a business relationship with Frederick Hornick, an investor in Colorado. Hornick served as a recruiter of other investors and as Rafferty's messenger to them regarding directions for wire transfer of investment funds. The government presented evidence that Rafferty and Gallo knowingly misrepresented a number of material facts to these investors related to the business prospects of UMDA; taken together, these statements misrepresented the value and liquidity of the UMDA shares. The evidence also showed that Rafferty did not reveal, to either the investors or Gallo, past legal judgments against him: specifically, a 1991 conviction for securities fraud, a 1993 injunction against further acts of securities fraud, and numerous civil suit judgments. A large number of individuals who dealt with either Rafferty, Hornick, or both purchased shares of UMDA and/or other companies. Such shares were either never delivered to these individuals or, if they were delivered, turned out to be worthless. At trial, the government argued that Rafferty defrauded these investors. Also, the government's trial evidence showed that Rafferty, either directly or via Hornick, caused the investors to wire their money to accounts controlled by Rafferty rather than to UMDA.

In July 2004, the government filed a sealed indictment charging Timothy Rafferty and Lawrence Gallo

with conspiracy to commit securities fraud and conspiracy to commit mail fraud and wire fraud. The government offered both defendants a plea agreement. Gallo pled guilty, but Rafferty did not. The grand jury returned the first superseding indictment against Rafferty alone on June 2, 2005, adding substantive wire fraud counts and extending the time period of the alleged conspiracy. On September 13, 2005, the district court held a hearing to consider Rafferty's motion to dismiss the first superseding indictment on grounds of vindictive prosecution. This motion was denied. In response to questioning by the district court on the specificity of the forfeiture section of the first superseding indictment, the government brought and ultimately tried Rafferty on a second superseding indictment.

At trial, the district court ruled that the 1991 conviction, the 1993 injunction and the two 2003 civil judgments, in Georgia and New York, specified in the second superseding indictment were admissible as intrinsic evidence. Regarding the civil judgments not specified in the second superseding indictment, the court ruled that testimony demonstrating that Rafferty secretly diverted UMDA investor funds to pay his debts and attorneys fees arising from these civil cases was inextricably intertwined. Limited evidence that Rafferty's conduct underlying those civil cases was similar to the facts in the instant case was admitted under Federal Rule of Evidence 404(b), but most of the evidence related to civil judgments not specified in the second superseding indictment was not admitted.

In preparation for trial, the government enlisted FBI financial analyst Gail Winter to review documents from various third-party bank accounts controlled by Rafferty, along with other records. Winter prepared eleven summary charts tracking the sources and destinations of money through these various accounts. Winter's charts traced $998,921 in investor funds to these accounts and showed that UMDA did not receive any of this investor money. The eleven summary charts, along with the bank records, were admitted into evidence at trial. Altogether, the voluminous account records, Winter's summary charts, and Winter's and others' trial testimony supported the government's theory that Rafferty funneled investor money through these accounts and used the funds to pay personal expenses, including, inter alia, mortgage and car payments, repayment of civil judgments and associated attorneys' fees.

Over the course of two sentencing hearings, the district court proceeded to determine the amount of loss by tracing and aggregating the investor funds deposited into Rafferty's various bank accounts. The district court emphasized that it was only including funds that were clearly invested in UMDA, not other companies, as a result of Rafferty's solicitation, and it deducted significant amounts of money where the bank records contained mistakes or where it was possible that some money might be double-counted. The district court concluded that the amount of loss attributed to Rafferty, after giving him the benefit of the doubt, was $1,198,450. The district court found the amount of loss to be between $1 million and $2.5 million and added a 16-level enhancement to his of-

fense level pursuant to U.S.S.G. § 2B1.1(b)(1). Rafferty's objection was overruled.

Rafferty's post-trial motions for new trial on Counts 1 and 2 and for acquittal on Counts 3 and 4 and were denied. Rafferty timely filed a notice of appeal. He claims improper admission of evidence, a violation of *Brady* v. *Maryland*, 373 U.S. 83 (1995), vindictive prosecution, and improper sentencing.[2]

DISCUSSION

I. *Admission of Evidence.*

A district court's evidentiary rulings are reviewed for abuse of discretion. *United States* v. *Baker*, 432 F.3d 1189, 1202 (11th Cir. 2005). We review preserved evidentiary objections for harmful error. *United States* v. *Hands*, 184 F.3d 1322, 1329 (11th Cir. 1999), corrected by 194 F.3d 1186 (11th Cir. 1999).

A. Summary Charts.

Rafferty challenges the admission of all eleven summary charts into evidence, alleges that the summary charts were "falsely created" in violation of his due process rights and claims that the manner in which the summary charts were introduced violated his due process right to effective cross examination.

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[2] Throughout his briefs, Rafferty focuses on his assertion that many of the transactions depicted in the summary charts do not involve UMDA directly. His argument confounds the issues in this case; the losses stemming from Rafferty's actions are not the damages to UMDA per se, but the injuries inflicted by Rafferty upon the investors he defrauded.

He also asserts a *Brady* violation related to the summary charts. As a preliminary matter, we find that the summary charts produced by FBI analyst Winter were properly admitted under Federal Rule of Evidence 1006 as summaries of the voluminous financial data. The data had also been previously admitted into evidence. *See United States* v. *Norton*, 867 F.2d 1354, 1362-63 (11th Cir. 1989) (finding no abuse of discretion where district court admitted a summary chart and related testimony after admission of the checks depicted in the summary chart as relevant to establishing a conspiracy to engage in racketeering activity). As the summary charts were properly introduced at trial, Rafferty's allegations of deprivation of his due process rights are without merit and we find no abuse of discretion.

B. *Evidence of Prior Conviction, Injunction and Civil Fraud Judgments.*

Challenges to evidentiary rulings are reviewed for an abuse of discretion. *Baker*, 432 F.3d at 1202. Count One of the second superseding indictment accused Rafferty of omitting material facts in communications with investors. Such alleged omitted facts included: (1) Rafferty's 1991 conviction for securities fraud in a New York federal court; (2) in 1993, an Illinois federal court permanently enjoined Rafferty from committing further acts of securities fraud; (3) the two civil fraud judgments entered against Rafferty in 2003; and (4) Rafferty's secret use of funds from investors in UMDA and other companies to pay his legal fees. Prior to trial, the government notified Rafferty of its intent to offer the foregoing evidence, including the facts underlying the civil

judgments, as inextricably intertwined with the charged offenses or alternatively as evidence of intent, plan or knowledge, pursuant to Federal Rules of Evidence 404(b).

Rafferty moved to exclude this evidence on the grounds that he did not have a duty to disclose this information, that the investors did not rely on his representations before investing, and that the facts underlying the civil judgments were inadmissible under Federal Rule of Evidence 404(b). The district court heard argument several times and held that the conviction, the injunction and the civil judgments specified in the second superseding indictment were admissible as intrinsic evidence with the charged offenses. On appeal, Rafferty renews his objections. The Supreme Court has recognized a fiduciary duty in the instance of so-called "temporary insiders," specifically:

> Under certain circumstances, such as where corporate information is revealed legitimately to...[a] consultant working for the corporation, these outsiders may become fiduciaries of the shareholders. The basis for recognizing this fiduciary duty is not simply that such persons acquired nonpublic corporate information, but rather that they have entered into a special confidential relationship in the conduct of the business of the enterprise and are given access to information solely for corporate purposes.

Dirks v. *S.E.C.*, 463 U.S. 646, 655 n.14 (1983).

To the extent the district court based its ruling on Rafferty's status as a "temporary insider" and that he was therefore under a duty to disclose the materially omitted facts, discussed supra, we find no abuse of discretion.

Furthermore, this court has held that:

> evidence of criminal activity other than the charged offense is not extrinsic under Rule 404(b) if it is (1) an uncharged offense which arose out of the same transaction or series of transactions as the charged offense, (2) necessary to complete the story of the crime, or (3) inextricably intertwined with the evidence regarding the charged offense.

United States v. *Ramsdale*, 61 F.3d 825, 829 (11th Cir. 1995). The government argues specifically that the evidence is part of the offense charged and thus intrinsic, as witnessed by the reference to the specific material omissions, discussed supra, in the charges in the indictment. See also United States v. Bianco, 181 Fed. Appx. 846, 853-4, 2006 WL 1374495 at *7 (11th Cir. 2006) (unpublished) (admitting evidence showing that the defendant [while on trial for mail fraud, wire fraud and money laundering] was on probation, owed restitution, had been enjoined from soliciting investments, and was not licensed to provide check-cashing services as intrinsic to the offense and/or as relevant to his intent). We find no abuse of discretion in the district court's evidentiary ruling.

Evidentiary errors that are not specifically objected to at trial are reviewed for plain error. *United*

States v. *Jernigan*, 341 F.3d 1273, 1280 (11th Cir. 2003) (holding that, "[u]nder this standard, we correct only for errors that are particularly egregious and that seriously affect the fairness, integrity or public reputation of judicial proceedings, and the only when a miscarriage of justice would result") (citations, internal quotations and alteration omitted). At trial, the government tendered a certified copy of the 1991 conviction against Rafferty, with the Information attached. It was admitted. Rafferty neither objected to the attached Information at that time nor when the prosecutor referred to the facts in the Information in closing argument. For the first time in his motion for new trial, Rafferty claimed that he was not provided with a copy of the Information during discovery and objected to the admission of the Information on the grounds that its admission was highly prejudicial to his right to a fair trial. The record reflects, however, that Rafferty's counsel expressly stated that he did not object to the introduction of a certified copy of the 1991 conviction with attached Information at trial. Therefore, we find that he has failed to show plain error in its admission at trial.

II. *Brady Claim.*

Rafferty's *Brady* claim centers around summary chart S-5, which focuses on the activity of a Millennium Capital Trading bank account controlled by Ralf Riverso. The government argues that unknowing UMDA investors deposited money into Riverso's bank account and that none of these funds actually reached UMDA. Rafferty filed a motion in May 2005, requesting any exculpatory evidence from the

government. The government's response did not inform Rafferty of an interview that took place in early 2005 in which Riverso explained to government investigators that most of the funds that passed through his accounts were held for the benefit of someone besides Rafferty. After the verdict was returned, Rafferty filed a motion for new trial. In furtherance of this motion, Rafferty submitted an affidavit by Riverso describing his 2005 interview with the government. The district court denied the motion for new trial.

"The suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Brady* v. *Maryland*, 373 U.S. at 87. Evidence is material "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Grossman* v. *McDonough*, 466 F.3d 1325, 1341-42 (11th Cir. 2006) (citation omitted). The information contained in the Riverso affidavit, assuming its veracity, would only call into question the information in one of the government's eleven summary charts [chart S-5]. The remaining charts, witnesses, and other evidence before the jury support the government's contention that investors' money was fraudulently funneled at Rafferty's direction to entities not including UMDA. Therefore, the Riverso evidence is not material, i.e., if it had been admitted at trial in Rafferty's favor, 12 there is not a reasonable probability of a different outcome in this case.

III. *Vindictive Prosecution.*

The dismissal of an indictment on the ground of prosecutorial misconduct is reviewed for an abuse of discretion. *United States* v. *Barner*, 441 F.3d 1310, 1315 (11th Cir. 2006). A district court abuses its discretion if it applies the incorrect legal standard or makes findings of fact that are clearly erroneous. *Id.* Rafferty alleges that the government brought the first and second superseding indictments to punish Rafferty for not pleading guilty. Rafferty also alleges that the Assistant U.S. Attorney threatened to withdraw the plea deal if he filed any more motions and later told Rafferty's attorney that, "[Rafferty] should have taken his three and one-half year plea while he had the chance."

We find that Rafferty has failed both to show any objective evidence of actual vindictiveness on the part of the government or to raise circumstances meriting a rebuttable presumption of vindictiveness. *See United States* v. *Dorsey*, 512 F.3d 1321, 1325 (11th Cir. 2008). The government acquired more evidence against Rafferty as a result of the Gallo plea agreement; nothing precluded the government from seeking the first and second superseding indictments.

IV. *Motions for Judgment of Acquittal and New Trial.*

A. *Motion for Judgment of Acquittal.*

Challenges to the sufficiency of the evidence are reviewed de novo. *United States* v. *Keller*, 916 F.2d 628, 632 (11th Cir. 1990). In this context, all reasonable inferences and credibility choices are made

in favor of the jury verdict. *United States* v. *Young*, 39 F.3d 1561, 1565 (11th Cir. 1994).

In order to uphold a lower court's denial of judgment of acquittal, it is only necessary to find that a reasonable factfinder could conclude that the evidence establishes the defendant's guilt beyond a reasonable doubt. *Keller*, 916 F.2d at 632. Rafferty argued that the evidence at trial was insufficient to sustain his conviction for wire fraud on Counts 3 and 4. However, a defendant need not be proven to have actually participated in or initiated the wire communications to be guilty of violating the wire fraud statute. *United States* v. *Snyder*, 505 F.2d 595 (5th Cir. 1974).[3] We find that the evidence and testimony presented at trial, including the summary charts which depict wire transfers of investment money, is sufficient to support the jury's verdict.

B. *Motion for New Trial.*

A denial of a motion for new trial is reviewed for an abuse of discretion. *United States* v. *Fernandez*, 136 F.3d 1434, 1438 (11th Cir. 1998). In furtherance of his motion for new trial on Counts 1 and 2, Rafferty argued that, by deliberating for only two hours, the jury clearly failed to follow the district court's instructions to consider evidence separately with respect to each count. Rafferty cited no law in support of his assertion that the short length of jury deliberations reflects any bias against him. Furthermore,

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[3] This Court adopted as binding precedent all Fifth Circuit decisions prior to October 1, 1981. Bonner v. City of Prichard, 661 F.2d 1206, 1209 (11th Cir. 1981)(en banc).

the Tenth Circuit has ruled against this very argument. See *United States* v. *Lawrence*, 405 F.3d 888, 904-05 n.11 (10th Cir. 2005) (denying motion for mistrial where jury deliberations lasted two hours and finding no evidence of prejudice against defendant).

Rafferty also alleged the improper admission of the summary charts, the civil and criminal convictions, including the Information attached to the 1991 conviction, as well as the violation of Brady, discussed supra. Incorporating our reasoning in sections I and II above, we conclude that the district court did not abuse its discretion in denying Rafferty's motion for new trial.

V. *Sentence.*

On appeal Rafferty argues that in handing down his 126-month sentence, the district court erred by applying a 16-level enhancement under U.S.S.G. § 2B1.1(b)(1)(I) based on its finding that Rafferty was responsible for losses between $1,000,000 and $2,500,000. In addition to his substantive arguments about § 2B1.1(b)(1)(I), Rafferty also argues that he was not given an opportunity to address the court on the loss issue and that the court erred by independently calculating the loss.

"A district court's determination regarding the amount of loss for sentencing purposes is reviewed for clear error." *United States* v. *Medina*, 485 F.3d 1291, 1303 (11th Cir. 2007)(citation omitted). Under U.S.S.G. § 2B1.1(b)(1), a defendant's base offense level is increased by 16-levels if the offense involved

losses in the amount of more than $1,000,000, but less than $2,500,000. U.S.S.G. § 2B1.1(b)(1)(I). The application notes provide that "loss is the greater of actual or intended loss." *Id.*, comment (n.3(A)). Actual loss is defined as "the reasonably foreseeable pecuniary harm that resulted from the offense." *Id.*, comment (n.3(A)(I)). "[T]he government bears the burden of supporting its loss calculation with reliable and specific evidence." *United States* v. *Renick*, 273 F.3d 1009, 1025 (11th Cir. 2001)(citation omitted).

"[T]he Sentencing Guidelines require a district court, at the sentencing stage, to make independent findings establishing the factual basis for its Guideline calculations." *United States* v. *Hamaker*, 455 F.3d 1316, 1338 (11th Cir. 2006). "The court need only make a reasonable estimate of the loss. The sentencing judge is in a unique position to assess the evidence and estimate the loss based upon that evidence. For this reason, the court's loss determination is entitled to appropriate deference." U.S.S.G. § 2B1.1(b)(1), comment (n.3(C)). "A reasonable estimate of the loss amount is appropriate because often the amount of loss caused by fraud is difficult to determine accurately." *Medina*, 485 F.3d at 1304 (citation omitted). "But while estimates are permissible, courts must not speculate concerning the existence of a fact which would permit a more severe sentence under the guidelines." *Id.*, (citation and alternation omitted).

"Fraudulent schemes...come in various forms, and we must consider the nature of the scheme in determining what method is to be used to calculate the

harm caused or intended." *United States* v. *Orton*, 73 F.3d 331, 333 (11th Cir. 1996). "The Sentencing Commission is clearly aware that different types of fraud may call for different methods of calculation." Id. at 333 n.4. Nonetheless, "[l]oss...focuses generally on the harm suffered by the *victim* of the criminal conduct rather than on the proceeds of the crime enjoyed by the *defendant*." *Hamaker*, 455 F.3d at 1337.

Rafferty argues that the district court erred by adopting a methodology of calculating his applicable guideline range that was not advanced by the government or the probation officer and that the court therefore assumed the role properly left to the prosecution. Specifically, he argues that the district court erred by not calculating the loss as the diminution in the net value of the shares between the time the conspiracy began and the time it ended, March 2003 to February 2004; the approach this Court employed in *United* States v. *Snyder*, 291 F.3d 1291, 1295 (11th Cir. 2002). Here, however, the district court found that the UMDA stock was "worthless" at the conclusion of the conspiracy and, therefore, no such subtraction was warranted. This exhaustion of the subject stock's value did not occur in *Snyder*, where shares of Biocryst Pharmaceuticals, Inc. were found to have retained some value over the life of the conspiracy.

Furthermore, this Court in *Snyder* did not mandate a particular loss calculation approach and stated that many methods were acceptable. "All that is required is that the court make a reasonable estimate

of the loss, given the available information." *Id.*, at 1295-96 (citations omitted). Here, the district court calculated the loss by determining the amount of investor funds deposited in to Rafferty's various bank accounts, taking care to only aggregate funds clearly invested in UMDA, not other companies, as a result of Rafferty's solicitation. The district court did not subtract the value of the stock at the end of the conspiracy, as such arithmetic would be pointless. *See United States* v. *Olis*, 429 F.3d 540, 546 (5th Cir. 2005) (stating that, "[i]n cases where defendants promoted worthless stock in worthless companies, measuring the loss as the entire amount raised by the schemes is neither surprising nor complex, and is fully consistent with civil loss calculation"). Also, the district court's loss calculation methodology was conservative, excluding some amounts that were transferred during the course of the conspiracy, in order to avoid the risk of mistakes or double-counting amounts.

Rafferty also contends that he had no opportunity to challenge the district court's loss findings, denying Rafferty his Sixth Amendment right to counsel. However, Rafferty addressed the district court on the loss issue in both his sentencing memorandum and in his objections to the pre-sentencing investigation report. Additionally, the district court heard extensively from Rafferty on the issue at both the first and second sentencing hearings. This argument is meritless.

Finally, Rafferty argues that the district court erred by independently calculating the amount of loss. His complaint is that the district court made calculations

of its own in between the first and second sentencing hearings. We find nothing wrong with this. Rafferty had the opportunity to address the district court when its calculations were presented. Indeed, the district court is required to exercise independent judgment in Guidelines calculations. See *United States* v. *Foley*, 508 F.3d 627, 633 (11th Cir. 2007) (holding that the district court erred by adopting the jury's forfeiture verdict as the amount of loss, thus abdicating its responsibility to make independent findings under the Sentencing Guidelines).

We find that Rafferty failed to demonstrate that the district court employed an improper loss-calculation methodology or that its factual findings were clearly erroneous. Furthermore, Rafferty's arguments that he was not given an opportunity to address the district court on the loss calculation issue and that the court erred by conducting its independent loss calculation are without merit.

CONCLUSION

The district court's denial of the motion for new trial and denial of the motion for judgment of acquittal re AFFIRMED. Rafferty's conviction and sentence are also AFFIRMED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 06-15090

UNITED STATES OF AMERICA,
Plaintiff-Appellee

versus

TIMOTHY RAFFERTY
a.k.a. Tim Rafferty,
Defendant-Appellant.

On Appeal from the United States District Court for the Southern District of Florida

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Before: THOFLAT and BLACK, Circuit Judges, and EVANS*

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

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* Honorable Orinda Evans, United States District Judge for the Northern District of Georgia, sitting by designation.

ENTERED FOR THE COURT:

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UNITED STATES CIRCUIT JUDGE

Filed Dec. 15, 2008

TITLE 15 - COMMERCE AND TRADE
CHAPTER 2B - SECURITIES EXCHANGES

§ 78j. Manipulative and deceptive devices

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange—

(a)

(1) To effect a short sale, or to use or employ any stop-loss order in connection with the purchase or sale, of any security registered on a national securities exchange, in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

(2) Paragraph (1) of this subsection shall not apply to security futures products.

(b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, or any securities-based swap agreement (as defined in section 206B of the Gramm-Leach-Bliley Act), any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

Rules promulgated under subsection (b) of this section that prohibit fraud, manipulation, or insider trading (but not rules imposing or specifying reporting or recordkeeping requirements, procedures, or standards as prophylactic measures against fraud, manipulation, or insider trading), and judicial precedents decided under subsection (b) of this section and rules promulgated thereunder that prohibit fraud, manipulation, or insider trading, shall apply to security-based swap agreements (as defined in section 206B of the Gramm-Leach-Bliley Act) to the same extent as they apply to securities. Judicial precedents decided under section 77q (a) of this title and sections 78i, 78o, 78p, 78t, and 78u–1 of this title, and judicial precedents decided under applicable rules promulgated under such sections, shall apply to security-based swap agreements (as defined in section 206B of the Gramm-Leach-Bliley Act) to the same extent as they apply to securities.

18 U.S.C. § 3771. Crime victims' rights

(a) Rights of Crime Victims.— A crime victim has the following rights:

(1) The right to be reasonably protected from the accused.

(2) The right to reasonable, accurate, and timely notice of any public court proceeding, or any parole proceeding, involving the crime or of any release or escape of the accused.

(3) The right not to be excluded from any such public court proceeding, unless the court, after receiving clear and convincing evidence, determines that testimony by the victim would be materially altered if the victim heard other testimony at that proceeding.

(4) The right to be reasonably heard at any public proceeding in the district court involving release, plea, sentencing, or any parole proceeding.

(5) The reasonable right to confer with the attorney for the Government in the case.

(6) The right to full and timely restitution as provided in law.

(7) The right to proceedings free from unreasonable delay.

(8) The right to be treated with fairness and with respect for the victim's dignity and privacy.

U.S.S.G. § 2B1.1

§2B1.1. Larceny, Embezzlement, and Other Forms of Theft; Offenses Involving Stolen Property; Property Damage or Destruction; Fraud and Deceit; Forgery; Offenses Involving Altered or Counterfeit Instruments Other than Counterfeit Bearer Obligations of the United States

(a) Base Offense Level:

(1) 7, if (A) the defendant was convicted of an offense referenced to this guideline; and (B) that offense of conviction has a statutory maximum term of imprisonment of 20 years or more; or

(2) 6, otherwise.

(b) Specific Offense Characteristics

(1) If the loss exceeded $5,000, increase the offense level as follows:

Loss (Apply the Greatest)		Increase in Level
(A)	$5,000 or less	no increase
(B)	More than $5,000	add 2
(C)	More than $10,000	add 4
(D)	More than $30,000	add 6
(E)	More than $70,000	add 8
(F)	More than $120,000	add 10
(G)	More than $200,000	add 12
(H)	More than $400,000	add 14
(I)	More than $1,000,000	add 16
(J)	More than $2,500,000	add 18

(K)	More than $7,000,000	add 20
(L)	More than $20,000,000	add 22
(M)	More than $50,000,000	add 24
(N)	More than $100,000,000	add 26
(O)	More than $200,000,000	add 28
(P)	More than $400,000,000	add 30.

(2) (Apply the greatest) If the offense—

(A) (i) involved 10 or more victims; or (ii) was committed through mass-marketing, increase by 2 levels;

(B) involved 50 or more victims, increase by 4 levels; or

(C) involved 250 or more victims, increase by 6 levels.